

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 96B126

INITIAL DECISION OF THE ADMINISTRATIVE JUDGE LAW

RICHARD RODENBECK,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
COLORADO STATE PENITENTIARY,

Respondent.

The hearing was held on June 3, 1996, in Denver before Margot W. Jones, administrative law judge. Respondent appeared through Diane Marie Michaud, assistant attorney general. Complainant, Richard Rodenbeck, was present at the hearing and represented by Carol Iten, attorney at law.

Respondent called the following employees of the Department of Corrections (DOC): Jane A. Kruse; Brian McFee; and Patricia Donice Neal. Complainant testified in his own behalf and did not call other witnesses to testify at hearing.

Respondent's exhibits 1 through 3 were admitted into evidence without objection. Complainant did not offer exhibits into evidence.

Complainant's request to sequester the witnesses from the hearing room was granted.

MATTER APPEALED

Complainant appeals the imposition of a one day disciplinary suspension.

ISSUES

1. Whether complainant engaged in the act for which discipline was imposed.
2. Whether complainant's conduct constituted a failure to comply with standards of efficient service and competence and wilful misconduct.
3. Whether the decision to impose a one day disciplinary suspension was arbitrary, capricious or contrary to rule or law.

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4. Whether either party is entitled to an award of attorney fees.

FINDINGS OF FACT

1. Complainant, Richard Rodenbeck (Rodenbeck), is a correctional technician with DOC. Rodenbeck has been employed by DOC for 6 years. He promoted to the rank of technician or sergeant in 1994. Rodenbeck works at the Colorado State Prison (CSP).

2. The CSP is a maximum security correctional facility. Prisoners requiring administrative segregation and death row inmates are incarcerated in this facility.

3. In February, 1996, Rodenbeck worked in a housing unit, pod F. As a correctional technician, Rodenbeck was expected to act as a role model for correctional officers and inmates. He worked under the supervision of Lieutenant Brian McFee and Captain Jane Kruse. The appointing authority for Rodenbeck's position is Patricia Donice Neal, CSP superintendent.

4. During Rodenbeck's employment, he was not previously disciplined. He received overall ratings of "good" and "commendable" on his yearly performance appraisals.

5. On February 7, 1996, Rodenbeck assisted in overseeing that inmates received the noon meal. Following the inmates' meal, he was seated with co-workers in a break area. Captain Kruse was making rounds in the areas where her subordinates were assigned to work. She entered the break area where Rodenbeck was seated at a table. She observed Rodenbeck was out of uniform. Rodenbeck had his shirt open at the neck.

6. Correctional personnel are required to wear their uniform in a prescribed manner. The shirt which is worn as a part of their uniform may have no more than one button open at the neck. On February 7, when Rodenbeck was observed by Captain Kruse, he had two buttons open at the neck of his uniform shirt.

7. Captain Kruse frequently is required to correct correctional personnel about their uniforms. Captain Kruse had been required to speak to Rodenbeck on several occasions about his failure to wear his uniform in the prescribed manner.

7. On February 7, Captain Kruse instructed Rodenbeck, "Sergeant Rodenbeck, please button your shirt. You are out of regulation." Rodenbeck buttoned his shirt without comment.

8. Immediately following Captain Kruse's instructions to Rodenbeck, Lieutenant McFee addressed Rodenbeck. Lieutenant McFee

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overheard Captain Kruse's instructions to Rodenbeck. Lieutenant McFee had instructed Rodenbeck on prior occasions about wearing a regulation uniform.

9. As Rodenbeck sat at the break table with his co-workers, Lieutenant McFee told him, "Captain Kruse has spoken to you about this. I have spoken to you about this. Why don't you keep your shirt buttoned?"

10. Rodenbeck became angry in response to Lieutenant McFee's direction to him. Rodenbeck felt that he was being cornered by Lieutenant McFee and that he was embarrassed to be addressed in this manner in front of his peers and correctional officers.

11. Rodenbeck's facial expression reflected that he was very agitated. Lieutenant McFee feared that Rodenbeck might physically assault him. Rodenbeck stood up and ripped his shirt open, popping two buttons off his shirt in the process. Rodenbeck remarked to Lieutenant McFee that here is the incident you can report.

12. Lieutenant McFee directed Rodenbeck to meet him in the shift commander's office. Lieutenant McFee reported the incident to Captain Kruse. Captain Kruse prepared a performance documentation form in which she recounted the incident involving the lieutenant and Rodenbeck.

13. Captain Kruse concluded that Rodenbeck's behavior on February 7, 1996, was an inappropriate display of anger. It set the wrong example for correctional officers who were present during the incident and exhibited a lack of self control which was not conducive to functioning in the maximum security facility. Captain Kruse directed Rodenbeck to leave the work place since there was only two hours left on the shift and Rodenbeck was not in the proper frame of mind to work at CSP.

14. Captain Kruse reported the incident to her supervisor who instructed Rodenbeck not to return to work until directed to do so. Captain Kruse was further directed by her supervisor to advise the appointing authority of the incident.

15. On or about February 8, 1996, Captain Kruse forwarded that performance documentation form to the superintendent and appointing authority, Patricia Donice Neal, for further action.

16. Rodenbeck was relieved of duty with pay for two hours on February 7, 1996 and on February 8 and 9, 1996. Neal directed Rodenbeck to return to work on February 10, 1996. By letter dated February 9, 1996, Superintendent Neal advised Rodenbeck of a Board Rule, R8-3-3, meeting to be held on February 23, 1996. The memo advised Rodenbeck that the meeting would be held to discuss the

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February 7, 1996, incident, when he became angry with Lieutenant McFee, and to discuss Rodenbeck's tardiness.

17. Rodenbeck met with the superintendent on February 23, 1996. Also present at this meeting were Rodenbeck's representative, Robert Roybal, business representative for AFSCME, and Gary Watkins, custody manager at the CSP. Rodenbeck explained to the superintendent that he was under pressure because of personal problems. Rodenbeck further explained that he lost his temper with Lieutenant McFee because he felt he was belittled and put down in front of his peers.

18. Following the R8-3-3 meeting, Superintendent Neal considered Rodenbeck's employment record. She concluded that he was a good correctional technician who had a promising career with DOC. However, she also concluded that she wanted to get his attention that the conduct which occurred on February 7, 1996, would not be tolerated. Superintendent Neal considered Rodenbeck's conduct to be more egregious because it occurred in the presence of correctional officers for whom Rodenbeck should be setting a good example.

19. In order to get Rodenbeck's attention, without causing him significant financial hardship, Superintendent Neal she imposed a one day disciplinary suspension for time served during the period from February 7, 1996, through February 9, 1996, when Rodenbeck was directed to leave the work place.

DISCUSSION

Certified state employees have a protected property interest in their employment and the burden is on respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

There is little dispute as to the underlying facts of this case. Complainant and Lieutenant McFee's testimony about the incident occurring on February 7, 1996, are in all important respects the

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same. The issues presented here are whether the discipline imposed was too severe and whether complainant was disciplined twice for the same incident.

Respondent contends that the evidence established that complainant engaged in the conduct for which discipline was imposed and that the discipline imposed was neither arbitrary, capricious or contrary to rule or law.

Complainant contends in his prehearing statement that he was disciplined twice for the same incident and that the facts and circumstances do not support the discipline imposed.

The evidence presented at hearing established that complainant engaged in the acts for which discipline was imposed. The evidence further established that the discipline imposed was within the range of disciplinary alternatives available to a reasonable and prudent administrator. Complainant's conduct, rising from his seat when he was addressed by his supervisor and ripping his shirt open, was inappropriate. Complainant's response to the remarks made by the lieutenant was grossly disproportionate to what was asked of him. His anger toward the lieutenant was not justified by the surrounding circumstances shown to exist and were under any circumstance inappropriate in the work place.

There was no evidence that complainant was disciplined or corrected twice for the same incident. Complainant received a copy of the performance documentation form. The procedure of providing complainant with a copy of the form was not a corrective action. Providing complainant with a copy of this form placed complainant on notice that the form was prepared by one of his supervisors who took note of some aspect of complainant's performance.

In the letter giving complainant notice of the R8-3-3 meeting, Superintendent Neal advised complainant that the meeting would be held, not only, to consider the February 7 incident but also to consider his tardiness. The testimony presented at hearing established that after the letter notifying complainant of the R8-3-3 meeting was sent to complainant, Superintendent Neal was advised that complainant was counselled by another supervisor about his punctuality.

Superintendent Neal testified that despite the fact that complainant was counselled about his tardiness by another supervisor, she used the R8-3-3 meeting as an occasion to discuss this issue with him. She testified that she ultimately imposed the one day disciplinary suspension because of the February 7 incident and not because of complainant's tardiness.

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There was no evidence presented at hearing that either party was entitled to an award of attorney fees and cost under section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B).

CONCLUSIONS OF LAW

1. Complainant engaged in the acts for which discipline was imposed.
2. Respondent established by preponderant evidence that complainant's conduct constituted wilful misconduct and a failure to comply with standards of efficient service and competence.
3. The decision to impose a one day disciplinary suspension was neither arbitrary, capricious or contrary to rule or law.
4. Neither party is entitled to an award of attorney fees.

ORDER

The action of the agency is affirmed. The appeal is dismissed with prejudice.

DATED this _____ day of
June, 1996, at
Denver, Colorado

Margot W. Jones
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the _____ day of June, 1996, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Carol Iten
Attorney at Law
789 Sherman Street
Denver, CO 80203

and to the respondent's representative in the interagency mail, addressed as follows:

Diane Marie Michaud
Assistant Attorney General
Department of Law
1525 Sherman St., 5th Floor
Denver, CO 80203

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NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **\$50.00**. Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must

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be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.